

C ~~2~~ 12. A microcuvette according to claim ~~10~~ 10, wherein the distance between the two substantially planar surfaces of said body member increases in a direction extending away from said inner end wall of said inner peripheral zone.

C ~~2~~ 13. A microcuvette according to claim ~~9~~ 9, wherein said cavity has a predetermined volume.

QC C ~~3~~ 14. A microcuvette according to claim ~~9~~ 9, wherein said cavity includes a dry reagent in a predetermined amount.

C ~~4~~ 15. A microcuvette according to claim ~~9~~ 9, wherein the distance between the inner surfaces of the body member at said measuring zone does not exceed 0.15 mm. --

REMARKS

Favorable reconsideration of this application is respectfully requested in view of the following remarks.

Accompanying this Amendment under separate cover is a Request for Approval of Proposed New Drawing Figure which seeks approval for the addition of new Fig. 4. This new drawing figure illustrates a capillary microcuvette having a channel configuration in accordance with the description in the middle of page four of the original disclosure and the recitation in Claim 3. The capillary microcuvette shown in Fig. 4 is the same as that depicted in Fig. 2, except that the channel at the inner periphery of the

cavity possess a slightly different configuration. No new matter is introduced by this new drawing figure since the capillary microcuvette shown in Fig. 4 illustrates features described in the original disclosure. Consideration and approval of the proposed new drawing figure are respectfully requested.

With respect to the drawing objection concerning the features set forth in Claim 4, such a feature is clearly illustrated in Fig. 2 and so it is unnecessary to change the drawings to address this point.

In view of the foregoing, withdrawal of the objections to the drawing figures is respectfully requested.

Original Claims 1-8 have been cancelled in favor of new Claims 9-15. The new claims have been drafted to ensure compliance with the provisions set forth in 35 U.S.C. § 112, second paragraph and to address the relevant points set forth on pages 2-4 of the Official Action. Several of the points raised in this regard require comment.

In one respect, the Official Action objects to the phrase "substantially parallel." The purported indefiniteness in this phraseology is said to be based on the observation that such claim language implies "something less than parallel". This rejection is untenable in several respects.

First, the use of the term "substantially" is so prevalent in patent practice that little time need be spent here debating the propriety of utilizing such claim terminology. Indeed, in a recent decision in which the claim phraseology "substantially equal" was held to be definite, the Federal Circuit observed that:

The criticized words are ubiquitous in patent claims. Such usages, when serving reasonably to describe the claimed

subject matter to those of skill in the field of the invention, and to distinguish the claimed subject matter from the prior art, have been accepted in patent examination and upheld by the courts.

Andrew Corp. v. Gabriel Electronics, Inc., 847 F.2d 819, 821, 6 USPQ.2d 2010, 2012 (Fed. Cir. 1988). The Official Action does not identify why the claim language at issue here does not reasonably define the claimed subject matter to individuals of ordinary skill in the art. The Official Action merely states that the claim language implies "something less than parallel." This observation does not question that the meaning of the phrase "substantially parallel" is unclear -- in fact, it seems to suggest that at least the Examiner knows what it means.

The patent statute requires that the claims define the invention with sufficient particularity to allow a person of ordinary skill in the art to understand the metes and bounds of the claimed invention. The claims at issue here do precisely that.*

The observations in the Official Action concerning the recitation that the channel has a "higher" capillary force than the measuring zone are equally untenable. The middle of page four of the Official Action describes this characteristic of the capillary microcuvette of the present invention. The suggestion in the Official Action that the term "higher" is indefinite because it is a "relative term" which does not describe how high "higher" is attempts to introduce confusion where confusion does not exist. At least in the context of the claimed invention here, it is irrelevant from the standpoint of claim

* The Examiner's attention is also directed to § 2173.05(b)(d) of the Manual of Patent Examining Procedure which addresses the use of the term "substantially" in claims.

definiteness whether the claim defines the **extent** to which the channel capillary force is higher than the measurement zone capillary force. A person of ordinary skill in the art would have absolutely no difficulty in understanding the metes and bounds of the present invention as defined in the claims. The recitation that the capillary force of the channel is higher than the capillary force of the measurement zone is definite in and of itself, regardless of whether the claim specifies how much higher the channel capillary force is relative to the measurement zone capillary force.

For at least the reasons set forth above, it is submitted that all of the claims currently pending in this application comply with the requirements of 35 U.S.C. § 112, second paragraph. Accordingly, withdrawal of the rejection based on that section of the patent statute is respectfully requested.

The Official Action also sets forth a rejection of several of the originally filed claims as purportedly being anticipated by the disclosure contained in U.S. Patent No. 3,565,537 to *Fielding*. *Fielding* discloses a specimen holder for testing the color of blood. The specimen holder is defined by an upper plate 10 provided with a recess 11 and a centrally located aperture 13. Another plate 16 is positioned in abutting relation to the one plate 10 to define a thin flat space 17 of closely defined constant thickness. The holder is adapted to have blood drawn through the aperture and into the flat space to permit measurement of the light absorbency of the blood. The specimen holder disclosed in *Fielding* is so significantly different from the claimed capillary microcuvette of the present invention that it is difficult to understand how it can be said that the disclosure in *Fielding* somehow anticipates the claimed invention.

The capillary microcuvette of the present invention is defined by a body member that is provided with a cavity defined by two opposing inner surfaces of the body member. A portion of the cavity defines a measuring zone within the body member. The cavity is provided with an inner peripheral zone at which is located a channel. The capillary microcuvette is advantageously designed so that the channel possesses a higher capillary force than the measuring zone. The capillary microcuvette according to the present invention is able to achieve the highly desirable results outlined in the present application.

Quite clearly, *Fielding* does not disclose a main body provided with a cavity having an inner peripheral zone at which is located a channel, with the channel possessing a higher capillary force than the capillary force associated with a measuring zone portion of the cavity.

The Official Action points to the discussion in column 2, lines 49-52 of *Fielding* as purportedly describing an inner peripheral zone having a channel of higher capillary force than the measuring zone. A careful reading of that portion of the *Fielding* disclosure reveals absolutely no discussion concerning the relative capillary force between a channel provided at an inner peripheral zone of a cavity defined in a body member and a measuring zone portion of the cavity, let alone that the channel should possess a higher capillary force than the measuring zone. In fact, it is not at all clear from the Official Action what portion of the sample holder disclosed in *Fielding* is believed to correspond to the claimed channel. In any event, it is rather clear that *Fielding* does not disclose a capillary microcuvette having features similar to those set forth in Claim 9. Accordingly,

the claimed invention is patentably distinguishable over the disclosure contained in *Fielding*.

The Official Action also relies upon the disclosure contained in U.S. Patent No. 4,088,488 to *Chang et al* as purportedly disclosing the use of a reagent. Regardless of what *Chang et al* purportedly discloses in this regard, it is clear that *Chang et al* does not make up for the deficiencies pointed out above with respect to the disclosure contained in *Fielding*. Accordingly, the combined disclosures contained in *Fielding* and *Chang et al* would not have suggested to a person of ordinary skill in the art the invention which is defined in independent Claim 9 and the claims that depend therefrom.

It is submitted that this application is in condition for allowance and such action is earnestly solicited.

Should any questions arise in connection with this application or should the Examiner believe that a telephone conference with the undersigned would be helpful in resolving any remaining issues pertaining to this application, the undersigned respectfully requests that he be contacted at the number indicated below.

Respectfully submitted,

BURNS, DOANE, SWECKER & MATHIS, L.L.P.

By: Matthew L. Schneider
Matthew L. Schneider
Registration No. 32,814

Post Office Box 1404
Alexandria, Virginia 22313-1404
(703) 836-6620

Date: May 15, 1996